82-1366

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP M. ADAMS,
Petitioner

versus

THE DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency is bound to honor the terms of a "plea bargain" given to a career employee in return for cooperation in an internal personnel investigation; and

Whether the statement, set out below, amounts to a promise of qualified immunity when the employee relies on that statement and actively cooperates in the investigation:

> j. That serious consideration be given to the exchange of "plea bargained" position of Mr. Adams in exchange for very detailed and specific facts and circumstances of each act of misuse of Government resources at Sardis. *This exchange would result in the retention of Mr. Adams in the Government workforce but the end result would be his hand would be severely slapped and it would be quite a while before he would ever be in a decision making position.*

(A U.S. Corps of Engineer district official admits reading to the petitioner the italicized words shown above.)

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IN THE
SUPREME COURT OF THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit rendered November 16, 1982.

OPINIONS BELOW

The U. S. Court of Appeals for the Federal Circuit, in a decision dated November 16, 1982, affirmed the decision of the Merit Systems Protection Board (MSPB) (Appendix A). The MSPB affirmed the removal of petitioner from the service by decision dated October 15, 1981. (Appendix B).

GROUNDS FOR JURISDICTION

Petitioner seeks review by this court of the Federal Circuit decision pursuant to rule 17.1(c) of the Rules of the Supreme Court and 28 U.S.C. 1254(1). The original appeal was filed in the U. S. Court of Claims (later transferred to the U. S. Court of Appeals for the Federal Circuit) under 5 U.S.C. 7703(b)(1).

PROVISIONS, STATUTES, or REGULATIONS INVOLVED

Except for judicial jurisdiction, no federal statute is involved. The issue in this case is primarily concerned with an interpretation of the due process clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Adams was assigned as assistant park manager at Sardis Lake near Sardis, Mississippi. Sardis is one of 7 flood control and recreational lakes in Arkansas and Mississippi maintained by

the U. S. Corps of Engineers and administered from the Corps' District Headquarters at Vicksburg, Mississippi.

The park manager was Robert Stanley Williams.

In February 1981, Lt. Col. Cooke from the Vicksburg Headquarters began an investigation at Sardis Lake. Col. Cooke was investigating some anonymous telephone calls that were alleged to have been received by Mr. Billy Joe Woods of the same Headquarters, concerning "wrongdoing" at the lake.

Col. Cooke questioned 19 government employees, and reported to Vicksburg that it would be necessary to secure the cooperation of some employee. Consequently, Col. Cooke recommended that a bargain be struck with Petitioner Adams to secure his cooperation. Paragraph 11 j, of his report, reveals that he recommended an agreement be made with Mr. Adams:

> j. That serious consideration be given to the exchange of "plea bargained" position of Mr. Adams in exchange for very detailed and specific facts and circumstances of each act of misuse of Government resources at Sardis. This exchange would result in the retention of Mr. Adams in the Government workforce but the end result would be his hand would be severely slapped and it would be quite a while before he would ever be in a decision making position.

(The subject of the investigation was the park manager, Mr. Williams --- not Petitioner Adams. The Respondent denied that

there was any evidence of an agreement with Mr. Adams and refused to furnish a copy of Col. Cooke's report until required to do so by the MSPB hearing officer at the time of the hearing.)

On about March 5, 1981, Mr. Woods called Petitioner at Sardis Lake and told him about the agreement:

> Mr. Woods read to me a portion of Col. Cooke's report from his first trip which pertained to myself. In it Col. Cooke recommended that I be let off with a slap on the hand in return for my full cooperation.

AR p. 312[1]

After receiving this assurance from Mr. Woods, Petitioner Adams began to comply with his part of the agreement, and began keeping a small notebook in which he wrote anything he could think of pertaining to wrongdoing at the lake. AR p. 381

To further abide by the agreement, Mr. Adams urged all of the Corps employees to give statements, and all of them agreed to --- including Mr. Adams. On March 14 Mr. Adams gave a long and detailed statement to Col. Cooke alleging that he had seen certain minor incidences of "wrongdoing" at the park, and that he had not reported them.[2]

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[1] Reference is to the Administrative Record, p. 312.

[2] Two examples are: seeing male employees working on a secretary's car that would not crank, and seeing a secretary typing a church bulletin while on official duty and using government equipment.

A Corps attorney advised the Vicksburg Headquarters that the charges against Mr. Adams were supported by "his own admission."

On April 9, 1981, Petitioner received a letter of proposed removal. He is again assured by the Vicksburg official, Mr. Woods, that the agreement would be honored. Later that month Mr. Harrison, another official at Vicksburg, assured Mr. Adams that the worst thing that could happen would be a transfer.

The Corps did not honor what the petitioner considered to be a leniency agreement, and issued a decision letter removing him from the service. After a hearing the MSPB affirmed the action of the Corps.

ARGUMENT

In the Federal Circuit the Corps argued that the petitioner never received an offer of immunity --- and that if he did, it was not judicially enforceable because: the petitioner did not follow the prescribed procedure outlined in the Organized Crime Control Act of 1970, and that the action against Petitioner was civil and not criminal and, therefore, "immunity" could not be granted.

(The Corps further argued that the employee did not prove that these officials had authority to give a pledge of immunity. The MSPB also felt that this was important:

"Appellant cites no authority, statutory, regulatory or

otherwise, which establishes that, in connection with an internal federal agency investigation, an agency can promise and grant immunity from disciplinary action to an employee involved in the investigation."

[Appendix B])

Prior to the hearing the Corps vigorously attempted to refuse to give a copy of Col. Cooke's report to the petitioner's attorney. It refused to comply with the hearing officer's order until the day of the hearing.

Although an interpretation of the facts is an issue, the basic facts are not in dispute. Corps officials admitted that they advised Petitioner of the "plea bargain" recommendation and they did not deny that they subsequently reinforced the "agreement" by encouraging the employee to cooperate with the investigating officer. One Vicksburg officer assured Mr. Adams, even after he had received the "proposal letter," that the most punishment he would receive would be a transfer.

Thus, the questions before the Supreme Court are: Did these actions by his superiors amount to a "plea bargain" and a "qualified immunity" promise, and if so, is this promise judicially enforceable in a "civil" action?

The question of whether a leniency agreement made to a government employee in a punitive type civil action is judicially enforceable, has apparently not been before the Supreme Court.

The courts have consistently required governments, both state and federal, to abide by the terms of a plea bargain in criminal cases. The judicially enforced terms are precisely the same as those that have been agreed upon --- no more and no less.

In *Santobello v. New York*, 404 U. S. 257, 30 L. Ed. 2d 427, 92 S.Ct. 495 (1971), the defendant was promised that if he would plead guilty to one count of the indictment, two counts would be dropped and the prosecuting attorney would not recommend the maximum sentence to the sentencing judge. Prior to sentencing, a new prosecutor was appointed who inadvertently recommended the maximum sentence. The Supreme Court said that "staff lawyers should let the left hand know what the right hand is doing" and that it made no difference that the breach of the agreement was inadvertent. The court remanded with an order to: allow defendant to be sentenced by a different judge or, in its discretion, withdraw his guilty plea to all counts.

> The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.
>
> The standards of the market place do not and should not govern the relationship between the government and a citizen. *People v. Reagan*, 395 Mich. 306, 235 N.W.2d 581, 585 (1975). "Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U. S. 438, 485, 48 S. Ct. 564, 575, 72 L.Ed.944, 960 (1928) (Brandeis, J., dissenting). If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard

> their obligations. That way lies anarchy. We deal here with a "pledge of public faith --- a promise made by state officials --- and one that should not be lightly disregarded." *State v. Davis*, Fla. App., 188 So.2d 24, 27 (1966).

Workmen v. Commonwealth, 580 S.W. 2d 206 (Ky. 1979).

A recent case (February 22, 1982) in the U. S. Court of Military Appeals throughly examined every issue presented by the case at hand. *Cooke v. Orser*, 12 M.J. 335 (CMA 1982). Lieutenant Cooke was charged with delivering highly sensitive and important documents to the Soviet Embassy. It was extremely vital for security reasons to determine what documents Cooke had compromised.

Consequently, the staff judge advocate allowed Air Force OSI agents to make certain assurances to Lt. Cooke that if he made a full disclosure he would not have to face a court martial. The accused continued to give detailed written accounts and thereafter passed a polygraph examination.

The staff judge advocate, aware of the possibility of the immunity pledge, made no effort to prevent its use and continued to accept the fruits of Cooke's cooperation. After Cooke's information was verified as true, the decision was made to prosecute him by court martial.

The Court of Military Appeals answered three questions:

1. Is it controlling that the Commanding General did not authorize an immunity agreement?

2. Did the defendant act to his detriment pursuant to the immunity agreement? and

3. What is the proper remedy?

The Court of Military Appeals held that Lieutenant Cooke's prosecution, after the immunity pledge, was a violation of due process, and the commanding general's silence did not legitimatize the proceedings. 12 M.J. at p. 345.

> In my earlier dissent in this case, I emphasized that, where, as here, the stakes are high, a suspect who has been asked for information --- and his lawyer --- must know that a promise of immunity which is given by a staff judge advocate possessing all the indicia of apparent authority and is reasonably relied on by the suspect will thereafter be judicially enforced. Otherwise, lips will remain sealed when it is vital to national security that they be unlocked. Although in this case an officer who may well have been a spy and traitor will escape military prosecution, it still is in the national interest that the promise of immunity be enforced. Likewise, it is in the national interest that the imperatives of due process, on which the principal opinion relies, be fully obeyed.
>
> Accordingly, I join Judge Fletcher in granting the petition.

12 M.J. at p. 358

CONCLUSION

The investigative technique of offering leniency to a government employee for his assistance in a personnel matter is not an uncommon one. It is unusual, however, for a government agency to

renege on a promise --- or at least it has been up to this point.

The lesson taught agency managers by this case is: Make sure the employee understands that he will receive leniency and act accordingly, but *don't put it in writing and don't use the word "immunity."*

Congress could legislate a procedure for these matters that would be understood by managers and employees. Until it does, the courts must require the government to honor its word.

The Court is urged to hear this case and, for the first time, announce some protection for government employees who take the word of their superiors at face value.

Respectfully submitted,

Wm Pace

WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20530, by first class mail.

This the 10th day of February, 1983.

Wm. Pace

WILLIAM M. PACE

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 77-81

PHILIP M. ADAMS,
Petitioner,

v.

THE DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Respondent

DECIDED: November 16, 1982

Before BENNETT and MILLER, *Circuit Judges*, and SKELTON, *Senior Circuit Judge.*

PER CURIAM

DECISION

The decision of the Merit Systems Protection Board (MSPB), MSPB No. AT07528110689, dated October 15, 1981, upholding the Department of the Army's removal of petitioner from federal service, is *affirmed*.

OPINION

After conducting an internal agency investigation, the Department of the Army sent a letter of proposed removal to the petitioner. The reasons for removal were stated to be: (1) the making of false statements concerning the purchase of government supplies and services; (2) the misuse of government facilities, property, and manpower; and (3) the failure to report violations of Army Regulation 600-50, Standards of Conduct for Department of Army Personnel. The Department of the Army subsequently sustained these charges and removed the petitioner from his employment effective June 12, 1981.

On June 15, 1981, the petitioner appealed his dismissal to the MSPB. The petitioner contended that (1) he should not have been removed from federal service because the government had promised him that his hand would only be "severely slapped" if he cooperated with the agency investigation, and (2) his removal from federal service was inappropriate in view of his cooperation with the investigation.

The MSPB fully considered, and rejected, petitioner's arguments. The board held that even if the Department of the Army could grant immunity from disciplinary action to an employee involved in an internal agency investigation, it was clear that no agreement of immunity was reached in this case. The petitioner's subjective impression that an immunity agreement existed did not support a finding that petitioner was actually promised immunity. The board also declined to modify the agency-imposed penalty because it found that the agency had struck a reasonable balance after considering all relevant factors.

In view of the evidence before us, we cannot conclude that the MSPB's decision was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence ...." 5 U.S.C. § 7703(c) (Supp. V 1981), *as amended by* the Federal Courts Improvement Act of 1982, Pub. L. No. 97-167, § 144, 96 Stat. 25. Accordingly, on the basis of the parties' submissions and oral argument, we affirm the decision of the MSPB and thus find it unnecessary to decide the other issues raised by the parties.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

INITIAL DECISION NO. AT07528110689
Date: October 15, 1981

PHILLIP M. ADAMS,
Appellant,

v.

DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Agency

INTRODUCTION

By petition dated June 15, 1981, Mr. Phillip M. Adams (appellant) appealed to the Atlanta Regional office the decision of the Department of the Army, Corps of Engineers, Vicksburg, Mississippi District (the agency), which resulted in his removal effective June 12, 1981. Appellant was employed as a Park Manager,

GS-11, and served as the Assistant Resource Manager at the Sardis Lake Field Office, which is located in northern Mississippi and which falls within the jurisdiction of the Vicksburg District's Operations Division. Stated another way, appellant was second in command at that field office.

The removal action was based upon a charge of making false statements concerning the purchase of government supplies and services; a charge, with several supporting specifications, of misuse of government facilities, property and manpower; and a charge, with several supporting specifications, of failure to report violations of Department of the Army personnel standards of conduct. On appeal, appellant denies several of the charges and argues that the penalty of removal was excessive. In the alternative, he maintains that he was promised immunity in return for his cooperation in an investigation, and that as a result, the agency is in effect estopped from taking disciplinary action against him.

A hearing was requested in connection with the appeal, and one was conducted in Jackson, Mississippi, on August 19 and 20, 1981, by the undersigned presiding official of the Board. This decision is based on the evidence and representations presented at that hearing, as well as on the written submissions of the parties.

JURISDICTION

This appeal is governed by the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)

(codified in scattered sections of title 5, United States Code). *See* Reform Act, § 902(b), 92 Stat. at 1224; 5 C.F.R. § 1201.191. The Board has subject-matter jurisdiction over removal actions. 5 U.S.C. § 7512; 5 C.F.R. § 752.401(a). It has personal jurisdiction over appellant because he is an individual who occupied a position in the competitive service and was not serving a probationary period at the time of his removal. 5 U.S.C. § 7511(a)(1)(A); 5 C.F.R. § 752.401(b)(1).

FACTUAL BACKGROUND

Appellant had been employed by the agency for approximately 10 years, and had served in a supervisory capacity at Sardis Lake for approximately four years, at the time of his removal. His immediate supervisor during his tenure at Sardis Lake was Mr. Robert S. Williams, Resource Manager. He was relieved of his duties there in January 1981 and appellant was appointed as Acting Manager at Sardis Lake. The agency's responsibilities there include maintenance of recreational facilities utilized by the public.

During the first half of February 1981, Mr. Billy Joe Woods, Chief, Recreation Resources Management, Vicksburg District, received a number of telephone calls from employees at Sardis Lake alleging improprieties and wrongdoings at that facility. The allegations were passed up through civilian and military channels and apparently were considered serious enough that a full-scale investigation of the entire Sardis Lake Field Office Operation was ordered by a General Read, the senior-ranking military person in

the Lower Mississippi Valley Division. The investigation was conducted by Colonel Joseph D. Cooke, a professional investigator, Chief of Security Law Enforcement and Acting Inspector General for a geographic division of the U. S. Army which included Sardis Lake.

Cooke made two separate trips to Sardis Lake, during which time he interviewed employees as well as non-employees from the local area, and obtained documentation in connection with what appeared to be improprieties, unauthorized and illegal actions by employees over a period of several years. From affidavits which appellant himself provided, as well as documentation independently obtained by Colonel Cooke, it appeared that, at a minimum, appellant had over a period of time been aware of, but failed to report, violations of agency regulations. As a result, Mr. Woods was sent by the agency from Vicksburg to Sardis Lake to relieve appellant of his duties as Acting Manager of that facility. Mr. Woods arrived on March 10, 1981.

After Colonel Cooke completed his investigation, and after writing several reports concerning his findings, decisions were made to initiate disciplinary actions against several employees at Sardis Lake, including appellant.[1] On April 7, 1981, Mr. James W. Harrison,

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[1] Prior to the hearing, appellant moved for the production of copies of those reports. The agency's objections to that discovery request were overruled in an order issued by the Board on August 11, 1981, and the agency was ordered to produce all portions of the reports in question which pertain to appellant. In an 11th hour motion, the agency moved for certification of that ruling as an interlocutory

Assistant Chief, Operations Division, Vicksburg, issued a notice to appellant proposing to remove him from his position on the basis of the three charges previously described and which will be discussed in greater detail in the following section of this decision. Appellant presented a written reply on December 17, 1981, in which he responded to each of the specifications in support of the charges, and to which he attached, apparently for purposes of mitigation, several statements as to his character and reputation from fellow employees and personal friends and acquaintances.

The Notice of Decision was issued on May 21, 1981, by Mr. John E. Hite, Chief of the Operations Division and Mr. Harrison's immediate supervisor. Mr. Hite found all of the reasons contained in the Notice of Proposed Removal (also referred to herein as advance notice) sustained,[2] and warranting appellant's removal. As noted above, appellant's removal was effected on June 12, 1981. The instant appeal followed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appellant's removal was processed under the provisions of

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appeal to the Board. After allowing for response by appellant at the beginning of the hearing, the undersigned presiding official denied the motion as not meeting the criteria set out at 5 C.F.R. § 1201.92 of the Board's regulations. For a detailed explanation of that ruling, *see* Hearing Transcript (hereafter, HT), pp. 11-27.

[2] There was one exception, which will be discussed separately herein, and which involves specification (d) in support of Reason No. 3 in the advance notice.

subchapter II of chapter 75 of title 5, United States Code. Thus, the issue which must first be addressed is whether the agency has met its statutory burden of supporting its charges and specifications by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). Because of the large number of charges and specifications in this case, they will be examined separately below.

The first charge against appellant is that he made false statements concerning the purchase of government supplies and services, in violation of Army Regulation (AR) 600-50, Appendix A, pages 4 and 5 which state, in pertinent part, that making false statements in a government matter is a prohibited activity for which personnel may be penalized. According to the notice, in August 1978, appellant signed several invoices and a body shop ticket covering approximately $600 worth of automobile parts and repairs to agency vehicles which appellant allegedly was aware were not in fact obtained from the automobile dealer in question, Heafner Motors, Incorporated. Rather, those falsified documents were prepared to cover the purchase of two brand new radios for installation in government trucks assigned to appellant and his supervisor. His supervisor received an AM/FM eight-track stereo CB radio for his truck, and appellant received an AM/FM radio for his truck. According to the notice, the documents in question were signed by appellant for the sole purpose of reimbursing Heafner Motors for the two radios and constitute a violation of AR 600-50 with respect to the making of false statements in government matters.

There are few factual disputes between the parties concerning appellant's involvement in the purchase of the radios. In August 1978, Sardis Lake received some pick-up trucks without radios. Shortly thereafter, Mr. Williams advised appellant that the Equipment Utilization Section in the Vicksburg District Office authorized his purchase of radios for himself and appellant by charging the purchase cost to repairs for other vehicles. A purchase order for bulldozer parts from Heafner Motors was prepared for that purpose. However, the two employees who would normally be in a position to sign such a purchase order, Messrs. Hurston Newcomb and Edward L. Rowsey, refused to sign the purchase order. They were aware that the bulldozer in question was no longer at Sardis Lake, that Heafner Motors did not sell bulldozer parts, and that the purchase order therefore was false.

Following the refusal of his subordinates to sign the purchase order for bulldozer parts, Mr. Williams, with appellant present, telephoned an official at Heafner Motors and ordered approximately $600 worth of parts and repairs for agency automobiles, an amount which would cover the two radios which in fact were purchased from and installed by Heafner Motors in the two pick-up trucks operated by Mr. Williams and appellant. Apparently, the invoices and body shop ticket from Heafner Motors which ultimately were used to cover the cost of the radios were not presented to the two employees who previously refused to sign a purchase order. In any event, appellant himself signed the documentation in August 1978, and personally delivered the documentation to Heafner Motors, which ultimately resulted in the

purchase of the two radios.

The agency argues, and appellant does not dispute, that appellant knowingly signed invoices containing false information. Appellant also admitted that he is aware of the standards of conduct set forth in AR 600-50. HT, p. 353. Appellant further acknowledged that he was otherwise aware of the proper procedures for purchasing government equipment. HT, p. 363. His defense to the charge is that Mr. Williams advised him the method used for purchasing the two radios had been authorized by Vicksburg and that he, appellant, therefore assumed it was not improper to sign fictitious documents for automobile parts and repairs. As to his signature on the invoices, appellant wrote in his written reply[3] that he signed the "tickets" under direct orders from Mr. Williams who had assured him that that particular method of purchasing the radios had been authorized. Appellant's position with respect to this charge, then, is that he believed that the false statements to which he affixed his signature had been authorized.

Yet, approximately one year later, in August 1979, appellant signed a Form 225 to requisition a Citizens Band Radio for the Sardis Lake Field Office. (Agency Hearing Exhibit #6). Here, appellant used the proper procedures for making such a request of the Vicksburg District Office. He offered no explanation for not using the same method used in 1978 which he now claims he assumed was the authorized method for obtaining radios. Finally, I

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[3] Appellant testified at the hearing that everything he wrote in his written reply was the truth. HT, p. 352.

note that although appellant stated without equivocation in his written reply that he was specifically directed by Mr. Williams to sign the false documents for the purchase of the two radios, Mr. Williams testified that he did not remember issuing such a directive. HT, p. 337. The credibility of appellant's "assumption" that the false invoice method for purchasing the radios had been authorized is also attacked by the credible and undisputed testimony of Mr. Newcomb. He testified that in a discussion with appellant concerning the initial bulldozer purchase order, appellant indicated he was aware that "the dozer parts' tickets were illegal". HT, p. 214.

In reaching a finding on this charge, I do not consider it relevant that appellant may not have conceived of the method by which to purchase radios which were not in any event authorized by agency procurement regulations, even if accurate requisition requests had been made to the District Office. What is clear from the evidence is that appellant knowingly signed false statements in violation of agency regulations. His assertions that he assumed his signing of false statements had been authorized because Mr. Williams told him so, given the unusual and circuitous manner in which the radios were ultimately purchased, simply is not believable. For these reasons, I find the first charge is supported by a preponderance of the credible evidence of record. Therefore, the charge is sustained.

The second charge against appellant is that he misused government facilities, property, and manpower. With regard to this charge, the advance notice again refers to Army Regulation 600-50, as follows:

(1) Army Regulation 600-50, 20 October 1977, paragraph 2-4 states "Government facilities, property, and manpower . . . will be used only for official Government business. DA personnel will not directly or indirectly use, or allow the use of, Government property of any kind . . . for other than officially approved purposes."[4]

Specifications (a) and (b) in support of the second charge are that appellant allowed the personal use of government employees, Messrs. Nathaniel Draper and Harden Fonville to perform personal services for Mr. Williams, but made no effort to correct those actions. All of the specifications in support of the second reason are based primarily on an affidavit given by appellant on February 24, 1981.

In his affidavit, appellant described Mr. Draper as Mr. Williams' "houseboy" who spent more time at Mr. Williams' residence than performing government duties. Among the personal services appellant wrote he saw Mr. Draper perform for Mr. Williams were to "work in the garden, feed the dog, mow the grass". Appellant described Mr. Fonville in a similar manner, characterizing him as Mr. Draper's replacement when the latter was not at work or under the influence of alcohol. He has seen Mr. Fonville washing the windows at the Williams' residence, taking wood to the residence and feeding their dogs. In addition to the foregoing, Mr. Newcomb offered testimony which was not disputed by appellant that

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[4] The agency response (Enclosure 3) contains the full text of AR 600-50. All quotes from this regulation which appear in the advance notice, including the above, are accurate.

appellant was aware that the two individuals in question spent time washing personal cars for the Williamses. HT, p. 209

On appeal, appellant does not deny any of the foregoing, nor does he deny that he failed to take any action to put a stop to those activities which he admittedly saw taking place on a regular and recurring basis over a lengthy period of time. Rather, he states in his written reply that he did not consider the services performed by Draper and Fonville to be improper in that those services were performed on government property. That is, the Resource Manager at Sardis Lake, Mr. Williams, is provided a residence at that facility. Appellant also noted that the vegetables in the garden worked on by Mr. Draper were eaten by all of the employees and added that he, appellant, was of the opinion that personal services were typically performed for Resource Managers, although he did not provide the basis for that opinion or furnish any evidence in that regard.

The foregoing explanations must be viewed as a weak attempt to later rationalize in his written reply what appellant previously admitted in his affidavit concerning his knowledge of wrongdoing by two subordinates. The personal services performed by those individuals clearly were in violation of agency regulations, as appellant himself did not dispute. Thus, I find that appellant did fail to take actions to stop the misuse of facilities, property and manpower in violation of agency regulations. Accordingly, specifications (a) and (b) are supported by a preponderance of the evidence and are sustained.

Specification (c) charges appellant with allowing Mr. Draper to perform duties while on duty and receive government pay while not on duty when Mr. Draper was under the influence of alcoholic beverages. The agency bases this accusation solely on appellant's February 24, 1981 affidavit. Here, however, the charge as to appellant's lack of action is not supported by a preponderance of the evidence. Appellant did not write in his affidavit that he had seen Mr. Draper perform duties while under the influence of alcohol. Rather, as noted in his later written reply, he wrote that he had on several occasions seen Mr. Draper report to duty or already on duty while under the influence of alcohol. Appellant wrote that in those instances he reported the situation to Mr. Williams or himself instructed Mr. Draper that he could not work and would have to leave the agency premises. Appellant did not indicate any knowledge that Mr. Draper actually received pay for time spent off duty while under the influence of alcoholic beverages.

Given that specification (c) is based solely on the foregoing recitation by appellant, I find the agency has not supported by a preponderance of the evidence its accusation concerning the performance of duties and receipt of pay by Mr. Draper while under the influence of alcoholic beverages. Accordingly, I find this specification not sustained.

Specification (d) charges that appellant allowed two subordinates, Messrs. Steve McGregory and Roy Simmons, to work on Mr. Williams' personal vehicle during duty hours using government tools.

It is significant to iterate at this point that at the hearing, appellant swore to and stood by the information contained in his written reply. He wrote that on one occasion, he saw Simmons and McGregory look under the hood of Mr. Williams' Datsun; that he did not see them perform work on the car or use government tools; and that he felt they were doing this on orders from Mr. Williams and he, appellant, was in no position to challenge such orders. This explanation, first made after receiving the notice proposing to remove appellant, is in direct contradiction to appellant's own affidavit of February 24, 1981. Appellant then wrote, as set out in the advance notice, that

> I have seen Roy Simmons and Steve McGregory work on Stanley's (Williams) Datsun during gov't time, using gov't tools usually up at the house.

The foregoing hardly suggests that appellant merely saw the two subordinates looking under the hood of a Datsun on one occasion. Rather, appellant clearly wrote that he saw Simmons and McGregory work on Mr. Williams' vehicle "usually" at the latter's house. Appellant offered no explanation for the different versions he gave of his knowledge of this matter, nor did he explain how his recollection of events was clearer on April 17, 1981, when he submitted his written reply, than it was on February 24, 1981, a point in time closer to the events actually described. Under the circumstances, given what I consider to be a demonstration of lack of credibility on appellant's part with respect to the first charge discussed earlier, I accept his first account of his knowledge of work performed on Mr. Williams' vehicle as the more accurate account. Since appellant again does not deny that he failed to take action to

stop this misuse of government manpower, I find specification (d) supported by a preponderance of the evidence and sustained.

Specification (e) in support of the second charge is that appellant allowed Ms. Lila Vrooman's personal vehicle to receive mechanical work in the maintenance shop. The February 24 affidavit, by itself, does not support this specification. Appellant therein wrote that he had seen Ms. Vrooman's car in the government shop during government time. He added that it would be common knowledge that no private vehicle would or could be worked on under such circumstances without Mr. Williams' knowledge and approval. In his written reply, appellant stated that he was not aware of any work actually being performed while the car was in the maintenance shop, even though he had seen the car there.

Notwithstanding the foregoing, appellant offered no explanation as to why he did not have Ms. Vrooman's vehicle removed from the maintenance shop, whether or not he was aware of any work being performed on the vehicle. This is of significance because the appellant himself recognized that the mere placement of a personal vehicle in the maintenance shop was improper. In any event, I do not find credible appellant's denial of awareness that work was being performed on the vehicle in question. Mr. Edward Lee Rowsey, a forestry technician at Sardis Lake, testified that in two or three instances, he saw Ms. Vrooman's vehicle being worked on by government employees during duty hours, and that based on one or two conversations between himself and appellant concerning that matter, appellant was aware of that situation. HT,

p. 144. Ms. Louise C. Sheley, a secretary at Sardis Lake, testified that it was general knowledge in the office that work was being performed on Ms. Vrooman's car and that to her knowledge, appellant was aware of this. HT, pp. 172-173. Appellant did not challenge the credibility of, or otherwise specifically deny, the testimony cited above. Based on that testimony, which I found to have been credibly given, as well as the inferences in appellant's affidavit concerning the likelihood that work was being performed on Ms. Vrooman's vehicle, I find that he was aware of this improper use of government facilities, property and manpower. And, since it is clear that appellant took no action to put a halt to this improper activity, I find specification (a) is supported by a preponderance of the evidence and is sustained.

The last charge in support of the removal is that appellant failed to report violations of AR 600-50, "Standards of Conduct for Department of Army Personnel." The advance notice cites paragraph 2-10, "Reporting Suspected Violation," as follows:

> DA personnel who have information which causes them to believe that other DOD personnel have violated a statute or standard of conduct imposed by this regulation should first bring the matter to the attention of those persons. If those persons are one's supervisors or the communication is not expected to remedy or does not appear to have remedied the problem, a report will be made to the immediate supervisor of those persons and to the Standards of Conduct Counselor or Deputy Counselor.

The notice continued by advising appellant that in his capacity as Assistant Park Manager, he had a responsibility to see that the

agency's Standards of Conduct were upheld; that he was directly responsible for correcting and eliminating violations of those standards; and that failing this, he was responsible for reporting abuses which he could not correct. The notice contains nine specifications in support of the charge that appellant failed to report specifically described violations of AR 600-50 to which appellant admitted having knowledge in an affidavit dated March 13, 1981. These specifications will be listed together below because appellant did admit both that he was aware of all of the violations and that he failed to report any of the activities outlined in the specifications to any official above Mr. Williams, with whom he discussed only a few of those violations. The nine specifications in question are as follows:

(a) The November 1980 incident when a Government refrigerator was cleaned and painted at the shop, loaded on Mr. Robert Birge's pickup truck by Mr. Birge and Mr. Robert S. Williams, and carried to Ms. Lila Vrooman's apartment.

(b) The 1979 incident when Mr. Roosevelt Bradley was working on Ms. Lila Vrooman's personal vehicle inside the office compound fence during duty hours.

(c) The 1980-1981 incident when Ms. Lila Vrooman's appointment expired and she continued to work without authority.

(d) The use of Government surveying equipment by Mr. Williams and Mr. Bennie Brewer during duty hours to perform personal surveying.

(e) Ms. Janyth Robertson typing private materials for Mr. Williams, including surveying descriptions, church materials, and civic club materials.

(f) Your use of a Government vehicle to carry a private citizen, Ms. Marse Elle Self, to her physician upon directions from Mr. Williams.

(g) Accompanying Mr. Williams when you and he carried Ms. Self to a job interview during duty hours.

(h) The unauthorized use of compensatory time for wage grade employees.

(i) The falsification of Government procurement documents to pay for two radios, one for Mr. Williams' and one for your Government vehicle.

It is important to note at this point that appellant testified he was aware of the requirements of AR 600-50 to report violations to his immediate supervisor and, in the event violations are not corrected, to yet higher levels of authority within the agency. HT, pp. 353-354. Mr. Williams' immediate supervisor during this period of time was Mr. Woods. Appellant explained that he chose not to report any violations by Mr. Williams to Mr. Woods, or any violations by subordinates which Mr. Williams himself would not correct, because his, appellant's loyalty was to Mr. Williams. HT, p. 355. Appellant also explained at other times that he did not feel it would do any good to report violations to Mr. Woods or to go to authority above Mr. Woods in the Vicksburg District Office. It is unclear how appellant reached such a conclusion since he admittedly never reported any violations to anyone other than Mr. Williams. Thus,

he was not in a position to know that his compliance with the reporting requirements of AR 600-50 would be ineffective. It is clear from the tenor of appellant's statements and testimony, and the totality of the evidence in this case, that it was his loyalty to, and/or fear of, Mr. Williams which resulted in his consistent failure, with respect to all instances of misconduct and improper activity of which he admittedly was aware, to report such matters to the proper authorities. However, loyalty to one's supervisor hardly takes precedence over one's loyalty to the government.

I turn now to a brief discussion of the specifications in support of the third charge. With respect to (a), appellant said he did not report the refrigerator incident because he did not have firsthand knowledge of it and was not certain the refrigerator had been government property. Yet, in his March affidavit, appellant indicated that Mr. Williams told him the refrigerator was not at that time on the government property list, and that it would go to a needy family. Appellant wrote that he felt there was something improper about the transfer of the refrigerator, since he twice questioned Mr. Williams concerning the propriety of that matter. He even wrote that he told Mr. Williams it was wrong to have taken the refrigerator from agency premises. Despite this, appellant failed to report the matter to the Vicksburg office when Mr. Williams failed to take any action.

Appellant gave conflicting versions with respect to specification (b). He wrote in his affidavit that he in fact saw Mr. Bradley working on Ms. Vrooman's personal vehicle. He later wrote that he

saw Mr. Bradley squatted down in front of the car and assumed he was working on the vehicle. Whatever it was that appellant "saw" clearly was improper. Yet, he admittedly failed to report the situation to Mr. Williams or to higher authority. He wrote that he did not think it would do any good to report the incident, although again he offered no evidence in support of this theory.

With respect to specification (c), appellant suggested in his written reply that he did not report this matter because he learned of it by accident, having been told about the matter by Ms. Sheley, and having read a note on her desk from Ms. Vrooman.

Ms. Janyth O. Robertson, a Procurement Clerk at Sardis Lake, testified that the situation involving Ms. Vrooman's working without authority after the expiration of her appointment was common knowledge and that appellant knew of the incident. HT, p. 194. In fact, she attributed to appellant himself the origin of the term "sacred cow" to describe Ms. Vrooman's relationship with Mr. Williams. HT, pp. 194-195. Appellant does not dispute this testimony. He merely wrote that since Mr. Williams was aware of the situation, he, appellant did not pursue it. Again, this must be viewed as an unacceptable explanation for a clear violation of the reporting requirements contained in paragraph 2-10 of AR 600-50, cited above.

With respect to specification (d), Mr. Hite wrote in his notice of decision to appellant that he deleted that portion of the specification which reads "during duty hours", but otherwise found

the specification sustained.

Again, appellant offered no reasonable explanation for his failure to report the personal use of surveying equipment by Messrs. Williams and Brewer. That appellant may not have seen actual private surveying done by those individuals does not have a bearing on this specification. He wrote that he had seen Mr. Williams take surveying equipment home and return it at a later time. He also wrote that Mr. Brewer advised him that he, Mr. Brewer, had helped Mr. Williams with a survey during a weekend. Appellant did not indicate that he felt Mr. Brewer was lying, and he offered no explanation for his failure to report this situation to higher authority.

With respect to specification (e), appellant attempted to explain in his written reply that he considered Ms. Robertson's typing of church and civic club materials to be a "service to the public," and therefore not improper. It is almost incredulous that an individual in appellant's position and with his experience as a federal government supervisor, would argue that he honestly believed that the typing of private materials by a government secretary during duty hours for a church attended by Mr. Williams constituted a "service to the public." Appellant did not even attempt such an explanation with respect to the private surveying descriptions typed for Mr. Williams by Ms. Robertson. And, his explanation that he did not report this to Mr. Williams because it would not do any good begs the question at issue. Obviously, one would not have expected appellant to report violations of agency regulations for

which Mr. Williams was responsible to Mr. Williams. One would not reasonably have expected Mr. Williams to take disciplinary action against himself under such circumstances. The gravamen of the charge in this instance is appellant's failure to report these violations to authority above Mr. Williams, as required by AR 600-50.

With respect to specification (f), appellant wrote that he was acting under orders from Mr. Williams, that he felt sorry for Ms. Self and that Mr. Williams took advantage of him in this situation. If all of the foregoing were true, this would have given appellant not only an opportunity, but a motive, for reporting the situation to Mr. Williams' superiors, even aside from the regulatory requirement that such a situation be reported.

Appellant offers a novel explanation for his failure to report to higher authority his trip with Mr. Williams and Ms. Self during duty hours for the purpose of taking Ms. Self to a job interview. Appellant explained that when he got into the vehicle, he was unaware of the purpose of the trip, that he was merely a passenger. The agency offered no evidence to the contrary. Yet, this hardly constitutes a valid basis for failing to report the illegal use of the government vehicle to higher authority. Appellant may not have known the purpose of the trip when he got into the vehicle, but he certainly knew the purpose of the trip by the time he returned to Sardis Lake, assuming they even returned there immediately after the job interview. It is apparent that appellant's failure to report this matter to the Vicksburg office was because it was not only Mr.

Williams who was involved in the improper use of a government vehicle, but appellant himself as well.

With regard to specification (h), appellant does not deny knowledge of the prohibition of compensatory time for wage grade employees, as well as his awareness of Mr. Williams' local policy to violate agency regulations concerning that matter. Appellant merely wrote that he accepted Mr. Williams' judgment that under the circumstances at Sardis Lake, the use of compensatory time for wage grade employees, even if illegal, was justified.

Appellant's explanation does not excuse his failure to comply with the reporting requirements in question. He does not explain why he accepted Mr. Williams' judgment concerning the unauthorized use of compensatory time, nor does he explain why he failed to report the matter to higher authority to, at a minimum, ascertain whether agency regulations concerning compensatory time for wage grade employees can be waived under certain circumstances.

Finally, with respect to specification (i), it is apparent that appellant did not report the falsification of government procurement documents to pay for the two radios, discussed in greater detail above with respect to the first charge, because appellant himself was responsible for signing the false documents. Thus, to have reported that situation to higher authority would have implicated himself in an act of a serious wrongdoing. Nevertheless, appellant's failure to report the situation, which

included Mr. Williams' involvement in the procurement of the radios, clearly constitutes a violation of paragraph 2-10 of AR 600-50.

On the basis of the foregoing, I find that all of the specifications in support of the third charge against appellant, (a) through (i), with the modification concerning specification (d), supported by a preponderance of the evidence. Accordingly, I find the third charge is sustained in that, with respect to each of the specifications, appellant failed to properly report violations of statutes and standards of conduct.

The next issue to be considered is appellant's claim that, even if one or more of the charges are found sustained, the agency should be estopped from taking disciplinary action against him on the basis that he was promised immunity in return for his cooperation during the investigation by Colonel Cooke. This claim is based on one telephone conversation which appellant had with Mr. Woods. He asserts that Mr. Woods in effect told him that in return for his cooperation -- i.e., divulging all he knew about improprieties by personnel at Sardis Lake -- he, appellant, would receive a slap on the hand in connection with his own involvement and his job would be saved. HT, pp. 344-345. Appellant testified that based on his conversation, he, appellant, was under the "firm impression" that he had been promised immunity. HT, p. 365. Appellant made it clear that his claim concerning the immunity is based solely on that one conversation with Mr. Woods, and not on any promises or statements, direct or indirect, by any other agency official. *See* HT, p.373.

Appellant cites no authority, statutory, regulatory or otherwise, which establishes that, in connection with an internal federal agency investigation, an agency can promise and grant immunity from disciplinary action to an employee involved in the investigation. This is raised because federal employees in general are required by their agencies to cooperate with investigative personnel and to divulge information and knowledge they have of wrongdoings when asked about such matters. However, even assuming that immunity could have been granted to appellant or anyone else under the circumstances of this case, it is clear that appellant has failed to establish that such an offer or promise was made to him.

Mr. Woods testified that in a conversation with appellant on March 5, 1981, he advised the latter that based on a report from Colonel Cooke, one of the recommendations was that appellant in effect receive a slap on the hand. HT, pp. 58-59. Mr. Woods stated, however, that he advised appellant that that was merely a recommendation. HT, p. 60. He denied that he had at any time made any promises or offers to appellant concerning what specific disciplinary action may be taken against him. He denied also that he made or reached any bargain with appellant concerning the ongoing investigation. HT, pp. 66, 92.

Mr. Woods' testimony was not specifically attacked by appellant. To the contrary, appellant testified when questioned more closely concerning his conversation that he could not remember the words used by Mr. Woods during their conversation. HT, p. 366. Rather,

he "took it" [Mr. Woods' words] as some sort of a promise. HT, p. 373. Appellant does not assert that Mr. Woods used the word immunity during their conversation; that Mr. Woods made a specific promise during their conversation; that Mr. Woods indicated he was speaking on behalf of the agency in making an offer to appellant; that he, appellant, asked Mr. Woods whether an offer or promise was being made; or even that he, appellant, in any manner conveyed to Mr. Woods that in light of their conversation, he would agree to do something specific in return for something specific.

From the foregoing, it is clear that based on information from Mr. Woods that there was a possibility that disciplinary action less severe than removal could be taken against him, appellant formed the "firm impression" that he had been promised immunity in return for his cooperation in an investigation. However, a subjective impression on the basis of the conversation described by appellant and Mr. Woods hardly supports a finding that appellant was promised immunity in this case and that the agency should therefore be prevented from taking sanctions against appellant. To the contrary, the credible evidence of record shows that no promise of immunity was made to appellant.

In light of the reasons and specifications found sustained above, the next broad issue to be examined is whether appellant's removal was for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a); 5 C.F.R. § 752.403(a). The agency again has the burden of proof on this element of the appeal. *Starkey v.*

Department of the Air Force, MSPB Case No. DA075209076 (1980). Normally, the agency must establish that there exists a rational relationship, or "nexus" between the sustained reason for the adverse action and its ability to carry out its mission. *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977). The Board takes the position that a showing by the agency of the nexus satisfies the general requirement of section 7513(a), but is insufficient to meet the statutory requirement that removal be for such cause as will promote the efficiency of the service. *Douglas v. Veterans Administration*, MSPB Case No. AT075299006 (1981). While the efficiency test is the ultimate criterion for determining whether the particular sanction imposed may be sustained, those determinations are quite distinct and must be separately considered.

In a particular case, aside from the evidence offered by an agency, there is some conduct and there are some reasons with respect to which both the general nexus as well as the appropriateness of the particular penalty assessed are obvious on the face of the facts. *Young v. Hampton, supra*, at 1257; *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978); *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1974). *See also, Douglas v. Veterans Administration, supra.* Prima facie nexus has been found to exist where the misconduct leading to dismissal was committed by the employee in the performance of his/her duties and/or was directly related to the ability of the employee to perform his/her duties and the ability of the agency to carry out its mission.

In the case at hand, it is clear that prima facie nexus is applicable. The sustained charges and specifications in this case show that between 1978 and 1981, appellant himself was involved in misconduct and violation of agency regulations and standards of conduct; was aware of numerous and continuing violations by subordinates and by his own superior and failed to put a stop, or even attempt to put a stop, to the improper and unauthorized activities; and with respect to yet another series of improper activities, failed to comply with requirements of his agency to report those matters to higher authority. It is apparent on its face that as a result of appellant's actions, and inaction, with respect to all of those matters, which are contained in the three charges set out in the advance notice, that the agency's ability to properly carry out its mission was adversely affected.

I turn now to the appropriateness of penalty element under the efficiency test. The Board will modify an agency-imposed penalty when it finds that the agency's judgment clearly exceeded the limits of reasonableness. *Douglas, supra,* at 34; *Snipes v. U. S. Postal Service,* MSPB Case No. AT075209206 (1981). A penalty should be selected only after relevant factors have been weighed. The purpose of the Board review is to insure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. Here, the relevant factors in support of the penalty imposed are the egregiousness and continuing nature of appellant's misconduct and failure to act as required, the nature of his position as a supervisor and second in command at an agency facility frequented by the

public; the fact that appellant was admittedly aware of the agency regulations which he violated on a continuing basis; and the fact that he did not have a change of heart concerning his willingness to divulge his knowledge of improper activities until after it was clear to him that a large-scale investigation into the Sardis Lake operation was about to be initiated. The fact that one specification in this case, that involving Mr. Draper under the influence of intoxicating beverages on and off duty, was found not to be sustained, cannot by itself mitigate against the appropriateness of the penalty selected in this case, given the pertinent factors described above.

In summary, based on the sustained reason and specifications for the adverse action, and in light of my findings that the general nexus and appropriateness of penalty elements clearly are present in this case, I find that appellant's removal was for such cause as will promote the efficiency of the service.

DECISION

The action of the agency in removing appellant from his position as Park Manager, GS-11, effective June 12, 1981, is hereby AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on November 19,

1981, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D. C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

/s/ Carl Berkenwald

CARL BERKENWALD
Presiding Official

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent this date by certified mail return receipt requested, to the following parties:

Mr. Paul H. Ponder
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Post Office Box 60
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Mr. Phillip M. Adams
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Copies of the foregoing were sent this date by regular mail to the following parties:

Office of Policy Analysis
Office of Personnel Management
Attention: Ms. Jeanette Neville
1900 E. Street, N.W., Room 3500
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Office of the Secretary
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Director for Civilian Personnel
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/s/ Cassandra D. Clark

Date: October 15, 1981
Atlanta, Georgia